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IN THE

Supreme Court of the United States

October Term, 1966.

No. 570.

BENJAMIN COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY MEMORANDUM.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for the Petitioner.

JAMES J. HOGAN,
420 Lincoln Road,
Miami Beach, Florida 33139,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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If petitioner, a member of the Bar, were not facing imprisonment and professional destruction in consequence of the judgment now sought to be reviewed, the prosecution's Brief in Opposition would qualify as an example of advocacy by obfuscation, arguing as it does questions that the petitioner in this case refrains from presenting.

But that is not all. The prosecution urges that petitioner should go to jail, without a new trial or even a new hearing, for having deducted from his reported income $30,000 paid to one Rosenbaum which the prosecution says was never paid, while simultaneously it argues that the United States is entitled to retain the not insubstantial tax that Rosenbaum paid it on the

footing that in fact he received the same $30,000 from petitioner in the precise year that petitioner dealt with this sum as a deductible payment.

This is more than merely inconsistency, more than simply lawyers' cynicism. It constitutes a truly frightening example of how the government—"the potent, the omnipresent, teacher" (Brandeis, J., in *Olmstead v. United States,* 277 U. S. 438, 471, 485)—currently deals with its citizens. We submit that a result so unconscionable and indeed so shocking calls for scrutiny by this Court.

First. We said, very plainly and explicitly (Pet. 9, 10), that the argument "that the United States could not properly prosecute an individual for acts in respect of which it simultaneously deprives him of his defense against such a prosection, in this instance depriving him of Rosenbaum's testimony by causing Rosenbaum to be indicted as a co-defendant," "has now been rendered moot by the circumstance that the indictment against [Rosenbaum] has, since [the] trial and before the argument below, been dismissed * * *."

Yet in the face of this express disclaimer, and while admitting the dismissal of the indictment (Br. Op. 10), the prosecution not only includes petitioner's plainly abandoned contention as a question presented (No. 1, Br. Op. 1), it argues the merits of that non-question at great length (Br. Op. 5-7).

Similarly, while petitioner only discusses *arguendo* the obvious proposition that the circumstantial evidence of the prosecution's reverse net worth treatment of Rosenbaum is less trustworthy than Rosenbaum's direct testimony as to whether he in fact received $30,000 from petitioner (Pet. 12-13), the prosecution

inflates that discussion also into a question presented (No. 2, Br. Op. 2), and similarly argues it at length (Br. Op. 7-9).

Second. The first question actually presented by petitioner (Pet. 2) was whether the court below erred in requiring him to call his severed co-defendant Rosenbaum to the stand to claim his privilege, as a prerequisite to establishing that co-defendant's testimonial unavailability, particularly where, as here, the trial judge ruled (R. 1312) that "neither side was in a position to call as a witness the severed defendant, Rosenbaum * * *."

The prosecution asserts (Br. Op. 7) first, that the court of appeals did not hold what it very plainly held in the passage quoted (Br. Op. 6-7); second, that (Br. Op. 7) in any event the court of appeals was right, without citing authorities and with no effort whatever to contradict Wigmore on the point (8 *Evidence* § 2268; see page references to 1940 and 1961 editions at Pet. 11); and, third, that (Br. Op. 10) the dismissal of the indictment as to Rosenbaum "does not mean that Rosenbaum would not be available as a witness, for he could still claim his privilege against self-incrimination," with a footnote about "One of the several possible theories on which Rosenbaum might still be indicted."

Petitioner's position concerning Rosenbaum's testimonial availability by reason of the dismissal was disclosed at the latest in May 1966, when this case was argued below. In the more than six months since, no effort whatever has been made to indict Rosenbaum on the theory now asserted (Br. Op. 10 note 4), "that he has engaged in a continuing conspiracy with petitioner to evade and defeat the latter's taxes."

It is only at the present juncture, with petitioner pressing for a hearing at which (Pet. 14) "Rosenbaum, no longer under indictment, is now compellable to testify," that the prosecution bares its fangs and threatens that, if petitioner is indeed awarded either a new trial or a new hearing, Rosenbaum will once more be indicted so as to make him again unavailable to petitioner as a witness at such new trial or hearing.

We submit that this precise threat is implicit in the prosecution's language that we have quoted from Br. Op. 10. Indeed, that language is not fairly susceptible of any other interpretation.

Third. The salient fact in this case in its present posture, and in the second and last question actually presented by the petition (Pet. 2), is that the United States is about to send petitioner to jail for not having paid $30,000 to Rosenbaum, while simultaneously it is retaining the tax it received from Rosenbaum on the footing that he received this identical $30,000 from petitioner.

The prosecution not only admits that Rosenbaum paid the tax due on the $30,000 he received, it defends the right of the United States to keep the tax thus paid (Br. Op. 11).

But, in order to justify the unconscionable result that thus ensues, the prosecution resorts to arguments that are untenable—and, in respect of some now made, that breathe a spirit of injustice as well.

1. Although admitting that Rosenbaum paid the tax due for 1960 in installments by reason of the $30,000 paid him by petitioner, the prosecution argues that Rosenbaum did not clear up his own back taxes (Br. Op. 11). But here the question concerns the propriety

of petitioner's criminal conviction, not the extent of Rosenbaum's civil obligations.

2. The prosecution argues that the United States collects less if Rosenbaum received the $30,000 from petitioner than if petitioner never made the payment, $10,602 as against $21,283 (Pet. 11). One answer is that this would be so even if the fact of payment had never been questioned. Another is that, so far as the prosecution is concerned, it is not only more interested in $10,681 than in petitioner's liberty, but, as the matter now stands, it keeps the $10,602 paid by Rosenbaum, and it can in addition, if it succeeds in having review denied, assess petitioner for the $21,283 deficiency plus a fraud penalty. The outsider may accordingly wonder whether on this occasion petitioner is dealing with Uncle Sam—or with Uncle Shylock.

3. The argument (Br. Op. 12) that "the court of appeals knew of both 'new' developments when it decided the case" simply makes the decision below even less defensible; as we said (Pet. 9), "a result so unconscionable calls for a better answer, and one more consonant with justice, than that given below."

4. The prosecution reargues the sufficiency of the evidence (Br. Op. 9), although that is not *now* a question in the case; accuses Rosenbaum of conspiracy to evade and defeat petitioner's taxes (Br. Op. 10 note 4), although the $30,000 Rosenbaum received from petitioner in 1960 was precisely the kind of "finders' fees" that constituted Rosenbaum's income of $28,000 in 1965 (Pet. 7); and, finally, the prosecution urges that the district court at the trial had everything before it (Br. Op. 8) because (Br. Op. 10) "Rosenbaum 'spoke through his tax return to the Court' (R. 1366)."

Right there is the fatal and crucial defect in the prosecution's contentions, for there is a vast difference, not of degree but of kind, between a tax return or a receipt and a witness's live testimony.

It was this very contrast, between "the dead page" on the one hand, and the witness's own "tone of voice or the gloss that personality puts upon speech," that was responsible for the deciding votes for reversal and remand in *Von Moltke v. Gillies,* 332 U. S. 708, 727, 730.

The same result should follow here, and for the same reason. At the trial, where, as the district judge said (R. 1312), "neither side was in a position to call as a witness the severed defendant, Rosenbaum," the latter could of course only speak through his tax return or through his receipt. Now, however, with the indictment against him dismissed, he is testimonially compellable. Now the question of payment can be determined with the aid of the observed testimony of both parties to the transaction.

Fourth. In our view, the new facts appearing since the trial—Rosenbaum's tax payment on the $30,000 he received from petitioner and its acceptance and retention by the government, and the dismissal of the indictment against Rosenbaum—call for petitioner to be granted a new trial.

But, at the very least, we submit that the case should be remanded to the district court for a hearing at which, with Rosenbaum available as a witness, it can reconsider its earlier determination, made without Rosenbaum's testimony, as to whether petitioner in fact paid him the $30,000.

Without extending the discussion further, we think it sufficient now simply to note that there is ample

authority in this Court's decisions for a remand for this limited purpose. E.g., *Von Moltke v. Gillies*, 332 U. S. 708; *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh v. United States*, 352 U. S. 1; *Shotwell Mfg. Co. v. United States*, 355 U. S. 233.

Fifth. We are dealing, not with merely inconsistent pleadings, but with an inconsistency of position on the part of the United States that reflects seriously and adversely on the administration of criminal justice in its courts. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for the Petitioner.

JAMES J. HOGAN,
420 Lincoln Road,
Miami Beach, Florida 33139,
Of Counsel.

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